No. 98-1304

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Supreme Court of the United States

October Term, 1998

EDWARD M. STEPHENS, M.D., JOSÉ A. YARYURA-TOBIAS, M.D., JUDITH GREEN Ph.D., FUGEN NEZIROGLU, Ph.D., ONA ROBINSON, Ph.D., AGNES WOHL, C.S.W., and THE ON-STEP INSTITUTE FOR MENTAL HEALTH RESEARCH, INC., individually and on behalf of all others similarly situated,

Petitioners,

v.

CMG HEALTH, FHC OPTIONS, INC., FOUNDATION HEALTH PSYCHCARE SERVICES, INC., GREEN SPRING HEALTH SERVICES, INC., HUMAN AFFAIRS INTERNATIONAL, INC., MERIT BEHAVIORAL CARE CORP., MCC BEHAVIORAL CARE INC., UNITED BEHAVIORAL SYSTEMS, INC., and VALUE BEHAVIORAL HEALTH, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Court's granting of this petition for certiorari would put to rest the conflict between the Second Circuit's decision in this case and the decisions of at least two other Circuit Courts of Appeals decisions. *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774 (7th Cir. 1994); *Brader v. Allegheny General Hospital*, 64 F.3d 869 (3d Cir. 1995). Moreover, a granted petition would resolve the Second Circuit's refusal to follow the Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). In affirming the District Court's order dismissing Petitioners' antitrust complaint, the Second Circuit decided to apply a "heightened pleading standard" diametrically opposed to the Court's unanimous decision that the Federal Rules of Civil Procedure require only "a short and plain statement of the claim." F. R. Civ. P. 8(a)(2). To prevent inappropriate judicial amending of the Federal Rules, the Court should grant this petition to reassert its decision in *Leatherman*.

Respondents' argument that both this Court and other Circuits uniformly dismiss antitrust complaints that do not specify facts in detail is wrong. Respondents attempt to cloud the Court's clear holding under *Leatherman* with inapposite cases focusing upon irrelevant issues of standing, analyzing case law superficially without regard to their context, and quoting incomplete dicta. These arguments should be firmly rejected and Petitioners respectfully request that the petition for certiorari be granted.

ARGUMENT

I. THE COURT'S PLEADING REQUIREMENTS SET FORTH IN *LEATHERMAN* APPLY TO ANTITRUST ACTIONS.

The *Leatherman* decision applies equally to all cases pled under Rule 8(a), including Petitioners' antitrust complaint. As Respondents would have it, *Leatherman* and Rule 8(a) would only apply to civil rights actions similar to the *Leatherman* facts. However, this Court unanimously held that "it is impossible to square the 'heightened pleading standard' . . . with the liberal system of 'notice pleading' set up by the Federal Rules." *Leatherman*, 507 U.S. at 168. The Second Circuit in reviewing the instant action decided that the requirement that a complaint include only a "short and plain statement of the claim showing that the pleader is entitled to relief" does not apply to antitrust actions. F. R. Civ. P. 8(a)(2). Rule 9(b), however, only imposes a particularity requirement in two specific instances; fraud and mistake. "Thus, the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging" antitrust liability. *Id.*

Respondents inappropriately rely on a litany of antitrust cases injecting standing issues not raised in the lower courts nor relevant to the issues of this petition. Specifically, Respondents cite authority where this Court and other Circuits have dismissed antitrust claims for a lack of standing or failure to plead an element of an action. Resp. Br. 8-10. In *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459

U.S. 519 (1983), this Court upheld a dismissal based not on infirmity of the pleadings under Rule 8(a). Rather, the Court noted that the petitioners, a labor union, with additional factual pleading could not meet the injury requirements to maintain standing as an association. *Id.* at 545.

II. THERE IS A DISTINCT CONFLICT BETWEEN CIRCUITS ON THE APPROPRIATE LEVEL OF PLEADING REQUIRED FOR AN ANTITRUST ACTION.

Respondents' superficial attempts to demonstrate a lack of conflict between the Second and Third Circuits also fails. The Third Circuit, relying on *Leatherman*, expressly rejected a "heightened pleading standard" for antitrust actions. *Brader v. Allegheny General Hospital*, 64 F.3d 869, 876-77 (3d Cir. 1995). One year earlier, the Third Circuit considered "bare bones" pleading sufficient under Rule 8(a). *Lundy v. Adamar of New Jersey, Inc.*, 34 F.3d 1173, 1194 (3d Cir. 1994) (Becker, J. concurring in part and dissenting in part). The Third Circuit acknowledged that *Leatherman* foreclosed any questions surrounding notice pleading under the Federal Rules and that any such changes should be addressed solely by Congress. *Brader*, 64 F.3d at 877. Incorrectly, Respondents cite Third Circuit antitrust cases dismissing complaints based on the plaintiffs' lack of standing. *Schuylkill Energy Resources, Inc. v. Pennsylvania Power & Light Co.*, 113 F.3d 405 (3d Cir. 1997) (plaintiffs failed to prove an antitrust injury); *accord City of Pittsburgh v. West Penn Power Comp.*, 147 F.3d 256 (3d Cir. 1998). Also, in *Schuylkill*, the Third Circuit restated its policy that antitrust issues are "not typically resolved

through motions to dismiss." *Id.* at 417 (citing *Brader*, 64 F.3d at 876). Thus, Respondents' attempt to cast doubt on the Third Circuit's decision in *Brader* is without merit.

Respondents' attempt to resolve the conflict between the Second and Seventh Circuits also fails. Seventh Circuit Chief Judge Posner relied upon *Leatherman*'s interpretation of Rule 8(a) that a complainant is not required to "plead the particulars of [their antitrust] claim." *Hammes v. AAMCO Transmissions, Inc.*, 33 F.3d 774, 778 (7th Cir. 1994). Respondents seek to distinguish *Hammes* based upon the jurisdictional element at issue in that case and its sufficiently detailed pleadings. Resp. Br. at 9. However, Respondents fail to consider the liberally pleaded conspiracy element which also at issue in *Hammes* was found to be consistent with Rule 8(a)'s requirements. *Id.* at 782. Moreover, the pleading examples raised by Respondents are no more detailed or specific than Petitioners' complaint.

> The *Hammes* complaint alleged that the defendant sold "franchises in several states," and that the plaintiff franchisee "mailed substantial fees" to defendant, "contributed money to [defendant's] national advertising," and "purchased equipment and inventory" from defendant.

Resp. Br. at 9.

Petitioners' complaint is as detailed as the *Hammes* complaint which Respondents considered to be sufficiently pled. Petitioners' complaint alleged that defendants intruded "into confidential matters" and imposed " 'gag' orders to facilitate their cost-cutting measures"; defendants "met together on numerous occasions and

have, thus, had the opportunity to communicate with one another about fees and other terms of engagement . . . "; defendants "acted jointly and in concert . . . at meetings and through mailings and publications, telephone and other forms of communication . . . " Pet. Br. at 57a. The level of specificity in Petitioners' complaint is equal if not greater than the *Hammes* complaint. Thus, Petitioners complaint is as detailed and amenable to Rule 8(a) as the *Hammes* complaint which Respondents considered to have "supporting facts" sufficient to go forward. Resp. Br. at 9.

Petitioners met the "short and plain statement" requirements under Rule 8(a) and *Leatherman*. The Second Circuit's decision directly flies in the face of the Court's decision and conflicts with its brethren Circuits. Denying this petition will only leave a jurisprudence of doubt for complainants who will be unable to determine what level of specificity they must plead to find relief.

III. PETITIONERS HAVE AN ABSOLUTE RIGHT TO SUBMIT AN AMENDED COMPLAINT UNDER RULE 15(a).

Respondents incorrectly assert that Petitioners "never presented this question to any court other than this one." Resp. Br. 10-11. In fact, Petitioners requested leave to amend, under Rule 15(a), at the District Court and were summarily denied without any opportunity to plead additional facts. Pet. Br. at 40a. In addition, Petitioners also raised the issue before the Second Circuit on brief. The Second Circuit with only a cursory discussion of the issue affirmed the dismissal order.

IV. A CONFLICT CONTINUES TO EXIST BETWEEN THE CIRCUITS REGARDING THE RIGHT TO AMEND UNDER RULE 15(a).

The Second Circuit's affirmation of the order dismissing Petitioners' complaint without leave to amend directly conflicts with the Ninth Circuit's decisions holding that, "[n]either the filing nor granting of . . . a motion [to dismiss] before answer terminates the right to amend; an order of dismissal denying leave to amend at that stage is improper." *United States ex rel. Richard Saaf v. Lehman Brothers, et al.*, 123 F.3d 1307, 1308 (9th Cir. 1997) (citing *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)).

Respondents' argument claiming that there is no conflict between the Second and Ninth Circuits relies upon cases where "the pleading could not possibly be cured by the allegation of other facts." *Cook, Perkiss and Liehe, Inc. v. Northern California Collection Service Inc.*, 911 F.2d 242, 247 (9th Cir. 1990). Respondents also rely on Ninth Circuit decisions dismissing complaints where the "movant has presented no new facts but only new theories. . . . " *Westland Water Dist. v. Firebaugh Canal*, 10 F.3d 667, 677 (9th Cir. 1993). Both cases are consistent with the Ninth Circuits decision in *Saaf* and are inapposite to the facts of this case. Here, an amended pleading could cure what the District Court regarded as inadequate. Petitioners were never given the opportunity to amend and thus, the District Court prevented any possibility of alleging additional facts. Moreover, Petitioners did not attempt to raise new theories, rather only to supplement the facts originally asserted.

CONCLUSION

For the foregoing reasons, the judgment below should be reversed, and the case remanded for trial.

Respectfully submitted,

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